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No Such Thing as Partial *Per se*: Why *Jefferson Parish v. Hyde* Should be Abolished in Favor of a Rule of Reason Standard for Tying Arrangements

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ABSTRACT

For more than a century, antitrust law has operated under two rules of analysis: rule of reason and *per se*. In 1984, however, the Supreme Court fabricated a new standard for a particular type of antitrust offense, referred to as the "partial *per se*" rule. This rule confuses and obscures the analysis taking place in tying arrangements and has no place in American jurisprudence. The rule should be abolished, and in its place, the Court should adopt the rule of reason analysis and elements suggested by Justice O'Connor in the very case from which this "partial" rule originated. By doing so, the Supreme Court will better enable lower courts to make proper decisions, prevent over-deterrence of tying arrangements, and clarify the standards that companies must meet to engage in this business practice.

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I. INTRODUCTION

Courts have long employed two different standards for analyzing antitrust claims: the rule of reason,[1] and the *per se* analysis.[2] For decades, these two rules have governed the entire canon of antitrust law.[3] The rule of reason is the usual standard, and the *per se* rule applies only to certain business practices.[4] Although the two rules operate in a similar manner, there is an important distinction between them. On the one hand, *per se* analysis applies only to acts that are facially anticompetitive, and thus always unreasonable.[5] On the other, the rule of reason deals with cases where the act in question is not intuitively unreasonable, and thus merits a more thorough examination of the act's circumstances and consequences.[6]

In 1984, the Supreme Court crafted a new rule specifically for analyzing tying arrangements, or situations where two products are bundled together for sale as a single purchase.[7] More specifically, a tying arrangement (also referred to as "bundling") is any business structure that leverages market power in one product or service to bolster sales of another product or service.[8] Under this new rule, set forth in the seminal case *Jefferson Parish Hosp. Dist. No. 2 v. Hyde* ("*Jefferson Parish*"), tying arrangements may be considered under the *per se* rule if a party can reasonably show that certain threshold conditions were met.[9] This hybrid of reason and presumptive liability is referred to as the "partial *per se*" rule.[10]

The Supreme Court's partial *per se* rule is superfluous and overcomplicated. The very year the *Jefferson Parish* opinion was handed down, the American Bar Association observed: "[A]s a practical matter, the need to conduct a number of market-related inquiries in order to invoke the per se [sic] rule . . . approaches a rule of reason inquiry."[11] As demonstrated herein, the conditions upon which the partial *per se* rule is invoked are identical in substance, procedure, and effect to a rule of reason consideration.[12] This demonstration will include a review of basic antitrust standards,[13] an overview of the *Jefferson Parish* case,[14] and the author's arguments for abandoning the partial *per se* rule.[15] Because these standards of

1. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 60 (1911).
2. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).
3. *In re* Processed Egg Products Antitrust Litig., 206 F. Supp. 3d 1033, 1040 (E.D. Pa., 2016).
4. *Id.*
5. All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc., 135 F.3d 740, 746 (11th Cir., 1998).
6. California Dental Ass'n. v. F.T.C., 526 U.S. 756, 757 (1999).
7. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15–16 (1984).
8. Park Irmat Drug Corp. v. Express Scripts Holding Co., 911 F.3d 505, 518 (8th Cir. 2018).
9. *Jefferson Parish*, 466 U.S. at 17 ("When the seller's share of the market is high . . . or when the seller offers a unique product that competitors are not able to offer . . . the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make *per se* condemnation appropriate.").
10. Gary Myers, *Tying Arrangements and the Computer Industry: Digidyne Corp. v. Data General Corp.*, 1985 DUKE L.J. 1027, 1029 (1985).
11. *Id.* at 1030 (quoting ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 89–90 (2d ed. 1984)).
12. *Jefferson Parish*, 466 U.S. at 15–16.
13. *See infra* Part II.
14. *See infra* Part III.
15. *See infra* Part IV.

analysis are so closely matched, the *Jefferson Parish v. Hyde* partial *per se* rule must be abolished and replaced with a rule of reason analysis.

II. ANTITRUST OVERVIEW

Antitrust law has its roots in the late nineteenth-century societal fear of industrial monopolies.[16] In the interest of preserving competition in American markets and, more directly, to prevent monopolies or combinations that would restrain trade or commerce, Congress passed additional relevant laws.[17] First was the Sherman Act of 1890, which broadly declared general uncompetitive behavior unlawful.[18] Enacted over two decades later, the Clayton Act of 1914 was aimed more at certain economic behaviors that posed a risk of improperly restraining trade.[19]

A. Per se and Rule of Reason Analysis

As noted above,[20] there are two approaches by which antitrust claims are measured: *per se* and rule of reason.[21] To understand the partial *per se* rule, as well as its similarities with these two primary modes of analysis, each standard warrants closer examination.

i. Rule of Reason Analysis

The rule of reason applies to most antitrust violations and is the standard rule for analysis.[22] In a broader sense, this rule should feel very familiar, as it simply consults the reasonable standard or duty of care that a person or firm owes to another.[23] In other words, a court examines the reasonableness of the economic behavior to determine if it led to anticompetitive results.[24] This comes naturally since most violations or offenses in any type of legal action require a reasonable examination of the facts in reaching a conclusion.[25]

Instead of declaring an act improper as a matter of law, rule of reason analysis requires a plaintiff to show not only that a business act or practice occurred, but

16. 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 1, Westlaw (database updated Aug. 2019).
17. *Id.; Id.* § 138.
18. 15 U.S.C. §§ 1–7 (2019).
19. 15 U.S.C. §§ 12–27 (2019); 29 U.S.C. §§ 52–53 (2019).
20. *See supra*, Part I.
21. Clarkwestern Dietrich Bldg. Sys., L.L.C. v. Certified Steel Stud Ass'n, Inc., 87 N.E.3d 629, 633 (Ohio Ct. App. 2017).
22. Guerrero v. Bensalem Racing Ass'n, Inc., 25 F. Supp. 3d 573, 588 (E.D. Pa. 2014).
23. *In re* Insurance Brokerage Antitrust Litig., 618 F.3d 300, 315 (3d Cir. 2010).
24. *Id.*
25. *See* John Gardner, *The Many Faces of the Reasonable Person*, 131 LAW QUARTERLY REVIEW 1 (2015), https://www.law.nyu.edu/sites/default/files/upload_documents/The%20Many%20Faces%20of%20the%20Reasonable%20Person.pdf (extolling the pervasive and useful position of the "reasonable person" in common law); *see also* John Gardner, *The Mysterious Case of the Reasonable Person*, 51 UNIV. OF TORONTO LAW JOURNAL 273 (2001), https://www.jstor.org/stable/825941?seq=1#metadata_info_tab_contents (examining the depth of involvement of this "reasonable person" standard in law).

that its results were anticompetitive.[26] One example of a business practice governed by the rule of reason analysis is the sharing of business information between businesses.[27] Upon establishing that the behavior is anticompetitive, a "burden-shifting framework" follows.[28] The burden of proof shifts to the defendant to show that pro-competitive effects offset and justify the anticompetitive behavior, after which the plaintiff again has the opportunity to show that the defendant's pro-competitive ends can be met with more reasonable methods that impose less restriction.[29] The court uses reason to determine which effects outweigh the other: the pro-competitive or anticompetitive.[30] The objective of this burden shifting is to weigh all the circumstances to determine whether the behavior in question imposes an unreasonable restraint on the market or the competition taking place in that market.[31] Often, this determination centers on a series of elements for the respective behavior.[32]

Because circumstances matter in a rule of reason antitrust action, there is often a good deal of attention paid to the existence of a firm's power in the appropriate market.[33] "Without a definition of that market there is no way to measure [the defendant's] ability to lessen or destroy competition."[34] Specifically, the court seeks to evaluate the extent of the offending party's ability to manipulate prices or inhibit competition within that market.[35] The root of market power is the ability to affect or alter the supply and demand of goods or services in a market.[36]

If a court must consult particularities in fact or circumstance, it is likely the case will receive a rule of reason analysis.[37] Elements or factors of an offense, intent, actual results, justifications, and market power examinations are all ways that courts consider these cases.[38] The truest indicator of rule of reason analysis, though, is reason itself—the court must discern whether the business practice was reasonable. In its essence, the rule of reason analysis is an examination of facts and circumstances—with particular reference to elements of an offense and the

26. Tanaka v. Univ. of S. California, 252 F.3d 1059, 1063 (9th Cir. 2001).

27. *Compare* American Column & Lumber Col v. United States, 257 U.S. 377, 411–412 (1921), *with* Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563, 586 (1925) (holding one information-sharing scheme unlawful and another lawful based on the amount and type of information shared. In *American Column*, companies were sharing sales information, customer information, lumber types, invoices, terms of sale, price lists, stock and inventory, and other reports. The amount of very current information exchanged was held to be a form of fixing prices, and was condemned by the court. In *Maple Flooring*, the information shared was past prices, averages, and total supply details. Additionally, this information was shared publicly rather than in secret between firms. This degree of information exchange was held lawful and acceptable by the court.).

28. Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003).

29. *Id.*

30. Tanaka v. Univ. of S. California, 252 F.3d 1059, 1063 (9th Cir. 2001).

31. United States v. Kemp & Assocs., Inc., 907 F.3d 1264, 1272 (10th Cir. 2018).

32. Care Heating & Cooling, Inc. v. American Standard, Inc., 427 F.3d 1008, 1014 (6th Cir. 2005) ("Rule of reason analysis requires the plaintiff to prove [lists elements of the offense].").

33. *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 315–16 (3d Cir. 2010).

34. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965).

35. Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n., 751 F.3d 368, 374 (5th Cir. 2014); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 477, 456 (1993).

36. Nat'l Collegiate Athletic Ass'n. v. Board of Regents of Univ. of Okla., 468 U.S. 85, 109 (1984).

37. 58 CORPUS JURIS SECUNDUM *Monopolies* § 70, Westlaw (database updated Sept. 2019).

38. William Holmes and Melissa Mangiaracina, ANTITRUST L. HANDBOOK *Sherman Act Section 1* § 2:10, Westlaw (database updated Nov. 2018).

market power of a firm—to decide whether a behavior imposes an unreasonable restraint on competition.[39]

ii. Per se Analysis

The *per se* rule allows for what amounts to "an evidentiary shortcut through the rule of reason" analysis.[40] It operates on the assumption that some behaviors are so egregious that they would be unreasonable and anticompetitive under all circumstances.[41] "It reflects the recognition that some practices will nearly always invite condemnation under the rule of reason."[42] The Supreme Court has held that *per se* analysis is for practices that facially appear to always or almost always prove anticompetitive.[43] A classic example of a *per se* unlawful offense is price fixing.[44]

Only certain practices are declared by courts to be *per se* unlawful.[45] A practice is declared subject to *per se* analysis if it is "unreasonable on its face" and "has 'no purpose except stifling of competition.'"[46] Once an anticompetitive act is subjected to this strict analysis, the extreme likelihood of anticompetitive effects makes further examination an unjustifiable proposition—the act is a violation of antitrust law merely because it occurred.[47]

This unforgiving standard of review operates like a strict liability offense; the plaintiff wins simply by showing that the act took place.[48] Once such an egregious business practice is shown, the defendant is not afforded the opportunity to make any defense argument.[49] Because of the stringent nature of this standard, the court is careful in naming the offenses subject to *per se* analysis.[50] "It is only after considerable experience with certain business relationships that courts classify them as per se [sic] violations."[51] Note that the experience mentioned by the court is experience with a practice, not with an industry; it is the behavior, not the market, that constitutes a *per se* offense.[52]

Interestingly, a *per se* analysis does not require consultation of a firm's market power.[53] "*Per se* liability is reserved only for those agreements that are 'so plainly anticompetitive that *no elaborate study of the industry is needed* to establish their illegality.'"[54] Once a plaintiff establishes that the defendant took a par-

39. United States v. Kemp & Assocs., Inc., 907 F.3d 1264, 1272 (10th Cir. 2018).
40. *Id.*
41. *Id.*
42. *Id.*
43. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979).
44. *See* United States. v. Joint-Traffic Ass'n, 171 U.S. 505, 505–506 (1898) (holding that railroad companies forming a combination to fix rates and fares was clearly anticompetitive and *per se* unlawful.).
45. United States v. Kemp & Assocs., Inc., 907 F.3d 1264, 1273 (10th Cir. 2018).
46. Guerrero v. Bensalem Racing Ass'n, Inc., 25 F. Supp. 3d 573, 587 (E.D. Pa. 2014).
47. *Id.*
48. *Kemp & Assocs., Inc.*, 907 F.3d at 1272.
49. *Id.*
50. *Id.* at 1273.
51. United States v. Topco Assocs., Inc., 405 U.S. 596, 607–08 (1972).
52. *Kemp & Assocs., Inc.*, 907 F.3d at 1273.
53. Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006).
54. *Id.* (emphasis added).

ticular action, "no further market analysis is necessary."[55] Contrast this with the rule of reason analysis, where determining market power is an important factor of proof.[56]

In summation, *per se* analysis subjects a defendant to liability under a theory that a particular practice is universally anticompetitive. Regardless of the argued justification or lack of market power, certain acts are never acceptable as a matter of antitrust law.[57]

B. Tying Arrangements

Recall that a tying arrangement is a business practice in which a firm leverages market power in one product or service to increase sales of another product or service.[58] Typically, this happens when a seller with market power with one product (known as the "tying product") bundles sales so that anyone wishing to buy the tying product must also buy another secondary product (known as the "tied product").[59] The concern in these tying arrangements is that a firm will exploit its tying product market power and force consumers to purchase the tied product when they would not otherwise do so.[60] One early example of a tying arrangement is in *International Salt Co. v. U.S.*, where International Salt leased salt-processing machines to customers with the mandatory condition that all salt used in the machines also be purchased from International Salt.[61] Under this arrangement, International Salt was using its market power in its machines (the tying product in this case) to forcibly sell more salt (the tied product).[62]

This forced purchase is dangerous because it may foreclose the market of the tied product when it would otherwise be competitive.[63] The market of the tying product is of less concern in tying arrangements; a seller may have an absolute monopoly over the tying product (which can be done lawfully through legal means, such as a patent), and the court thus focuses on the effects on the tied product's market.[64] It is when the bundling of the products inhibits the competition of the tied product that the bundling becomes a concern.[65]

It is worth noting that a tying arrangement does not entail just the single structure.[66] The two products need not be tied together in the same purchase to impose liability on a firm.[67] Tying arrangements include business plans wherein buyers agree with the seller (through their purchase of the tying product) to not buy the tied product from any other suppliers.[68] This was the arrangement in *In-*

55. *Kemp & Associates, Inc.*, 907 F.3d at 1272.
56. *See supra* Subpart II(A)(i).
57. *Kemp & Associates, Inc.*, 907 F.3d 1272–73.
58. Park Irmat Drug Corp. v. Express Scripts Holding Co., 911 F.3d 505, 518 (8th Cir. 2018).
59. Allen-Myland, Inc. v. Int'l Bus. Machs. Corp., 33 F.3d 194, 200 (3d Cir. 1994).
60. *Id.*
61. Int'l Salt Co. v. United States, 332 U.S. 392 (1947) (It is interesting to notice that this early tying arrangement was held to be unlawful *per se*. Over the years, the standard has changed and evolved into the partial *per se* rule eventually handed down in *Jefferson Parish*.).
62. *Id.*
63. United States v. Microsoft Corp., 253 F.3d 34, 87 (D.C. Cir. 2001).
64. Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 475 (3d Cir. 1992).
65. *Id.* at 475–76.
66. Park Irmat Drug Corp. v. Express Scripts Holding Co., 911 F.3d 505, 518 (8th Cir. 2018).
67. *Id.*
68. *Id.*

ternational Salt Co. v. U.S., where machine-purchasing customers signified in the lease agreement that they would not purchase salt from any company other than International Salt.[69]

Perhaps one of the most popular examples of a tying arrangement is *U.S. v. Microsoft Corp.*, which took place just after the turn of the century.[70] In the early 1990s, Microsoft quickly built an effective monopoly with its Windows Operating System ("OS").[71] The Department of Justice ("DOJ") brought an antitrust suit against Microsoft, which ended with a consent decree between the two parties.[72] Less than five years later, the parties were in court again, with the DOJ claiming that Microsoft had violated that consent decree.[73]

The violating behavior the DOJ relied on was Microsoft's practice of bundling its OS (the tying product) with its web browser, Internet Explorer ("IE") (the tied product).[74] The DOJ had concerns that Microsoft's monopolistic power in the OS market would unfairly promote IE, foreclose the browser market, and build another Microsoft monopoly.[75] After a preliminary injunction was granted against Microsoft, the software company appealed, and the D.C. Circuit held that the tying arrangement did not violate the consent decree.[76] However, the court did not make any decision regarding the lawfulness of the tying arrangement itself.[77] That question was reserved for another action, which began just before the D.C. Circuit issued its decision.[78]

When a number of state plaintiffs brought suit against Microsoft on the same account, the actions were consolidated so the court could finally rule on the tying arrangement itself.[79] The question finally arose in earnest as to whether Microsoft's practice of tying IE to OS was unlawful.[80] After the D.C. District Court found Microsoft liable, another appeal arose, and the case returned to the D.C. Circuit.[81]

The plaintiffs, together with the DOJ, alleged that Microsoft had unlawfully bundled IE to OS using four different tactics: (1) requiring purchase of both products together at a single price, (2) forbidding equipment manufacturers from uninstalling IE, (3) disabling the Add/Remove Programs utility's ability to let users uninstall IE, and (4) designing OS to sometimes override users' preference and make IE the default web browser.[82]

The D.C. Circuit affirmed, reversed, and remanded various aspects of the case.[83] The tying arrangement claim was vacated and remanded for the district

69. Int'l Salt Co. v. United States, 332 U.S. 392 (1947).
70. United States. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
71. *Id.* at 50–51.
72. *Id.* at 47; *see also* United States v. Microsoft Corp., 56 F.3d 1448, 1452 (D.C. Cir. 1995).
73. *Microsoft Corp.*, 253 F.3d at 47; United States v. Microsoft Corp., 147 F.3d 935 (D.C. Cir. 1998).
74. *Microsoft Corp.*, 253 F.3d at 47.
75. *Id.*
76. *Id.*
77. *Id.*; *see also* United States v. Microsoft Corp., 56 F.3d 1448 (D.C. Cir. 1995).
78. United States v. Microsoft Corp., 253 F.3d 34, 47 (D.C. Cir. 2001).
79. *Id.*
80. *Id.* at 84 (discussing a number of other claims regarding monopolization and attempted monopolization were also before the court.).
81. *Id.* at 48.
82. *Id.* at 84–85.
83. *Id.* at 118–19.

court to reconsider,[84] but the parties reached a settlement before the lower court took any action.[85] Despite the lack of a final rule from the court, the case remains illustrative for what tying arrangements are and how they may be structured.[86]

III. JEFFERSON PARISH V. HYDE AND THE PARTIAL PER SE RULE

With an understanding now of tying arrangements and the models of analysis used in antitrust law (*per se* and rule of reason), the groundwork necessary to investigate the seminal tying case, *Jefferson Parish v. Hyde*, is laid.[87] As previously alluded,[88] the Court in *Jefferson Parish* created and adopted the convoluted "partial *per se*" rule, ignoring the more prudent rule of reason elements suggested by Justice O'Connor in her concurrence.[89]

A. Case Overview

The incidents leading to the case began in 1977, when Edwin G. Hyde applied to become an anesthesiologist at East Jefferson Hospital ("EJH").[90] His application was reviewed by the hospital's credentials committee and medical staff executive committees, and both recommended employment.[91] However, the hospital board denied Hyde's application.[92] EJH was contractually bound to employ anesthesiologists exclusively from the professional medical corporation Roux & Associates ("Roux").[93] Because Hyde was not a member of Roux, EJH was contractually obligated to deny him employment.[94]

When Hyde heard about this contract between EJH and Roux, he brought suit seeking both employment at EJH and a court declaration that the contract was unlawful.[95] The District Court found that the anticompetitive consequences were minimal and held in favor of EJH.[96] The Court of Appeals reversed after identifying the tying arrangement EJH had hidden in its business structure.[97]

According to the Fifth Circuit, patients at EJH were forced to purchase anesthesia services from the same provider as their surgical services.[98] The tying prod-

84. *Id.* at 84.

85. *See* Amanda Cohen, *Surveying the Microsoft Antitrust Universe*, 19 BERKLEY TECH. L.J. 333, 335 (2004); *see also* United States v. Microsoft, 231 F. Supp. 2d 144 (2002) (approving the parties' consent decree drafted during settlement).

86. *See*, *e.g.*, In re: Cox Enters., Inc., 871 F.3d 1093 (10th Cir. 2017); ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 263 (3d Cir. 2012).

87. Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 4–5 (1984).

88. *See supra* Part I.

89. *Id.*; *see Jefferson Par*., 466 U.S. at 32 (1984) (O'Connor, J., Concurring); *see also* Myers, *supra* note 10, at 1029 (calling this rule by the name used herein: "partial *per se*.").

90. *Jefferson Par*., 466 U.S. at 5.

91. *Id.*

92. *Id.*

93. *Id.* at 5-6 ("The contract provided that any anesthesiologist designated by Roux would be admitted to the hospital's medical staff. . . . The hospital agreed to 'restrict the use of its anesthesia department to Roux . . . and no other persons, parties, or entities shall perform such services. . . .'").

94. *Id.* at 6.

95. *Id.* at 5.

96. *Id.* at 2.

97. *Id.*

98. *Id.* at 8.

uct was held to be the operating rooms, and the tied product was the anesthesiology.[99] The court then declared that EJH had sufficient market power in the tying product market (surgical services) to make purchase of its tied product (anesthesiology) coercive in nature.[100] Because patients were coerced into purchasing EJH's chosen anesthesia services, the Fifth Circuit held the tying arrangement illegal *per se*.[101]

EJH appealed from the Fifth Circuit ruling, and the Supreme Court granted certiorari to further examine the standard for tying products.[102] In a unanimous decision, the Court reversed the Fifth Circuit's holding and concluded that the tying arrangement was lawful.[103] Despite the uniformity of opinion, however, there was some disagreement as to what standard applied to tying arrangements.[104] Two concurring opinions came from the decision,[105] but the majority of the court applied what has now become known as the partial *per se* rule.[106] In 2006, part of the *Jefferson Parish* opinion was abrogated by another case, but that abrogation did not concern the partial *per se* rule and will play no part in this analysis."[107]

B. The Partial Per se Rule

At face value, the partial *per se* rule created in *Jefferson Parish* is contradictory at best. The majority declared with unquestionable certainty that "[i]t is far too late in the history of our antitrust jurisprudence" to think that some tying arrangements are not unreasonable *per se*.[108] In the very next paragraph, however, the Court seemingly backtracks on its strong assumption by claiming that, clearly, not all tying arrangements are anticompetitive.[109] In fact, these bundled sales are sometimes attractive to buyers, who enjoy the convenience of being able to acquire two items for the effort of one.[110] The care taken to exclude "certain tying arrangements" evinces the presence of inconsistency in this rule.[111]

To illustrate its point regarding the convenience of tying arrangements, the Court used the example of a supplier of baking materials.[112] There is no harm in a seller offering to sell flour and sugar either together or not at all; in fact, many

99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 4–5.
103. *Id.* at 2.
104. *Id.*
105. *Id.* at 32–47 (Brennan, J., concurring) (O'Connor, J., concurring).
106. *See* Myers, *supra* note 10, at 1029.
107. *See* Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006) (abrogating a presumption reiterated in *Jefferson Parish*, but stated in earlier cases). The *Jefferson Parish* court reiterated that when the government grants a patent, it presumptively conveys market power to the patent-holder. *Jefferson Par.*, 466 U.S. at 16. This rule existed in some form since the 1940s. *See Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 491 (1942). Before *Jefferson* Parish, the rule was stated most clearly in *U.S. v. Loew's, Inc.*, 371 U.S. 38, n. 4 (1962) (". . . when the tying product is patented . . . sufficiency of economic power is presumed."). The Court in *Illinois Tool Works* only abrogated this presumption, thus leaving the partial *per se* rule intact. *Ill. Tool Works, Inc.* 547 U.S. at 31.
108. *Jefferson Par.*, 466 U.S. at 9.
109. *Id.* at 11 ("It is clear, however, that every refusal to sell two products separately cannot be said to restrain competition.").
110. *Id.* at 12.
111. *Id.* at 9.
112. *Id.* at 12.

aspiring bakers will admire the efficiency of this opportunity.[113] Some circumstances—particularly in a competitive market, as the Court points out—allow for tying as a method of increasing competition.[114] The problem comes when the seller of the tied products has enough market power that it can "force" its consumers into purchasing both when they would ordinarily purchase just one.[115]

To determine whether there was a market power component forcing purchasers into their decisions, the majority examined a number of elements which, if all present, would subject EJH to *per se* liability.[116] These elements were more succinctly enumerated in *U.S. v. Microsoft Corp.*:

> There are four elements to a per se tying violation: (1) the tying and tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product from it; and (4) the tying arrangement forecloses a substantial volume of commerce.[117]

By analyzing these four elements, the majority in *Jefferson Parish* concluded that EJH's practice was not *per se* unlawful.[118] First, the Court found that surgery and anesthesiology were two separate products;[119] the two are billed separately, and patients often made requests for specific anesthesiologists to supervise their operations.[120] The Court is careful to note, however, that simply meeting this first element does not inherently render the arrangement unlawful.[121] Second, the Court examined the strength of EJH's market power and concluded that its 30% share of the local market was insufficient to raise concerns.[122] Third, the Court compared the two products at issue (surgery and anesthesiology) and concluded that there was little evidence of forcing.[123] Fourth, the Court concluded that, in light of the other elements, there was no evidence that this tying arrangement foreclosed consumer choice.[124]

Because the Court found that only one of the four elements had been met, the majority held that the tying arrangement was not *per se* unlawful.[125] This nearly three-decade-old standard is still used to consider tying arrangements.[126] One re-

113. *Id.*
114. *Id.* at 11–12.
115. *Id.* at 13–14 ("[W]e have condemned tying arrangements when the seller has some special ability—usually called "market power"—to force a purchaser to do something that he would not do in a competitive market.").
116. *See generally id.* (examining different elements to determine *per se* liability).
117. United States v. Microsoft Corp., 253 F.3d 34, 85 (D.C. Cir. 2001).
118. *Jefferson Par.*, 466 U.S. at 31.
119. *Id.* at 24–25.
120. *Id.* at 22.
121. *Id.* at 24–25.
122. *Id.* at 26–27.
123. *Id.* at 28 (The Court's reasoning here is slightly more muddled, but essentially the analysis concludes that most people do not demand separate consideration of each product on its merits, and therefore this tying arrangement did not foreclose a decision that many people made.).
124. *Id.*
125. *Id.* at 28–29.
126. *See* Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 913 (9th Cir. 2008) ("The Supreme Court has developed a unique *per se* rule for illegal tying arrangements. For a tying claim to suffer *per se* condemnation, a plaintiff must prove . . ."); Rick-Mik Enters., Inc. v. Equilon Enters. LLC, 532 F.3d 963, 971 (9th Cir. 2008) ("Not all tying arrangements are illegal.").

cent case draws attention to the discrepancy between the standard rule and the rule applied in *Jefferson Parish*:

> [T]oday's *per se* rule against tying is dramatically more nuanced than the typical *per se* rule. . . . Though the typical antitrust *per se* rule requires no analysis of market conditions or effects, the Supreme Court has declared that the *per se* rule for tying arrangements demands a showing that the tie creates "a substantial potential for impact on competition."[127]

Despite the abnormality of the rule, courts continue to follow this "nuanced" and rigorous partial *per se* analysis.[128]

C. The Concurrence

Three other justices on the Court joined Justice O'Connor's "rule of reason" concurrence in *Jefferson Parish*.[129] Though the decision was unanimous, the Court was split 5-4 as to which rule to adopt.[130] Justice O'Connor's analysis fell short by only one vote, but would otherwise have been the majority opinion.[131] The rule for analyzing tying arrangements would be far simpler and more effective had she managed to sway one more justice to her side.[132]

In short, O'Connor believed the court was right in not finding EJH's arrangement unlawful, but thought the time had come to scrap *per se* analysis in favor of a newer, simpler rule of reason standard.[133] She proposed three elements for consideration in a rule of reason analysis: (1) the market power of the seller in the tying market, (2) the threat of market power in the tied market, and (3) a basis for selling the two items separately.[134]

First, O'Connor would have the Court examine the seller's market power in the market of the tying product.[135] To illustrate why this is important, she returns to the analogy of the seller of baking supplies.[136] If the seller has market power over flour, then a tying arrangement with sugar is concerning; anyone who wants

127. In re: Cox Enters., Inc., 871 F.3d 1093, 1097 (10th Cir. 2017).
128. *Id.*
129. *Jefferson Par*., 466 U.S. at 32 (1984) (O'Connor, J., joined by Burger, Powell & Rehnquist, JJ., concurring).
130. *Id.* at 33.
131. *Id.* at 32.
132. *See generally*, Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds.'"). In *Jefferson Parish*, the Court, as noted, was unanimous, with five Justices joining in the opinion. Convincing one more Justice would have given Justice O'Connor's opinion its fifth vote and made it the holding. Alternatively, had there been a plurality, the Court would have been forced to decide which opinion is narrower. Instinctually, the majority opinion seems narrower, but even then, Justice O'Connor's view should have prevailed. *See Jefferson Par.*, 466 U.S. 2. The two opinions are identical in application (*see infra*, Subpart IV(A)), and the majority's holding opens up a new standard (partial *per se*) while O'Connor's operates within the existing framework of the law.
133. *Jefferson Par.*, 466 U.S. at 33.
134. *Id.* at 41 (summarizing the elements laid out in greater detail in the preceding paragraphs of the concurrence).
135. *Id.* at 37–38.
136. *Id.*

flour must also purchase sugar.[137] However, if the seller has no market power over flour, then there is no harm in bundling its goods with sugar.[138] Customers can seek out other sellers if they find the arrangement inconvenient.[139]

The second element O'Connor suggested is an analysis of the threat the seller poses in the market of the tied product.[140] If the seller is leveraging their market power in the tying product market in order to establish a monopoly in the tied product market, the arrangement is concerning.[141] In other words, a seller cannot use a first monopoly in order to get a second.[142] If, however, there is little risk of this secondary monopoly, or if entry barriers to that second market are low and new sellers may take up business, then competition will still be preserved.[143]

The final element argued for by Justice O'Connor is that there must be a "coherent economic basis" for treating the two products as distinct or separate.[144] As O'Connor pointed out, all but the basest and simplest of sales are of products that in some way consist of smaller products.[145] However, we do not think of these products as separate.[146] O'Connor used cars and engines, or cameras and lenses, as examples.[147] Neither example has aged well, and both prove problematic, as both engine and lens markets now exist independent of cars or cameras.[148] For simpler reference, consider a watch sold separately from its gears, or a smartphone and screen sold separately. While neither is wholly unheard of, the considerable weight of consumer practice is to purchase both as a single entity. With this element, O'Connor suggested that in order for the tying arrangement to be dangerous to competition, the two products must be ordinarily distinct.[149]

Even when all three of these elements are met, Justice O'Connor suggested that some tying arrangements will still be lawful.[150] This belief stands in marked contrast to the majority opinion.[151] While the *Jefferson Parish* majority holds tying arrangements *per se* unlawful if the four elements are met,[152] O'Connor persisted in her belief that even then, some arrangements are appropriately competitive.[153] Her concurrence argued that, in the end, the decision should come down to the observable economic effects of the tying arrangement.[154] O'Connor

137. *Id.*
138. *Id.*
139. *Id.* at 38.
140. *Id.* at 38–39.
141. *Id.* at 39.
142. *Id.*
143. *Id.* at 38.
144. *Id.* at 39.
145. *Id.*
146. *Id.* at 40.
147. *Id.* at 39.
148. *See Global Automobile Engine & Parts Manufacturing Industry: Industry Market Research Report*, IBISWORLD, https://www.ibisworld.com/industry-trends/global-industry-reports/manufacturing/automobile-engine-parts-manufacturing.html (last visited Nov. 2, 2019) (giving a report on the industry for automobile engines); *see also* Jim Fisher, *The Best DSLR and Mirrorless Camera Lenses of 2018*, PC (July 17, 2018), https://www.pcmag.com/article/362341/the-best-dslr-and-mirrorless-camera-lenses (offering an example of the thriving market for camera lenses).
149. *Jefferson Par*., 466 U.S. at 39–40 (1984) (O'Connor, J., concurring).
150. *Id.* at 41.
151. *Id.* at 16 (majority opinion).
152. *Id.*
153. *Id.* at 41 (O'Connor, J., concurring).
154. *Id.*

even cited another Supreme Court case where a number of tying arrangements are lauded for economic and pro-competitive benefits they introduce to the market.[155] Clearly, she viewed the standard for tying arrangements very differently than did the majority.

IV. ARGUMENTS FOR ADOPTION OF THE RULE OF REASON

In 1984, the opinion that implemented the partial *per se* rule represented a very narrow majority.[156] The rule was improper then, and now that the law and the economy have both further developed over 35 years,[157] it is even more improper. In the interest of reasonable, consistent, and applicable law, and the interest of market competition, the partial *per se* rule must be abolished, and a rule of reason analysis adopted.

A. The Two Systems of Analysis are Identical in Practice

The suggested elements for a rule of reason analysis in Justice O'Connor's concurrence are effectively the same as the majority's requirements for *per se* liability to apply.[158] By way of quick review, the elements of each are as follows. For the majority's partial *per se* rule, there must be (1) two separate products, (2) market power in the tying market, (3) forced purchase of the tied item, and (4) foreclosure of a substantial volume of commerce.[159] For the concurrence's rule of reason, there must be (1) market power in the tying market, (2) threat of market power in the tied market, and (3) an economic basis for selling the two items separately.[160]

To begin, note the obvious similarities between the two rules. Elements of both the partial *per se* and the rule of reason analyses seek evidence that the seller has market power in the market of the tying product.[161] Two other elements also share an uncanny similarity. The majority's first requirement is that the two products be separate from each other.[162] Meanwhile, the concurrence looks for a "coherent economic basis" for treating the two products as distinct.[163] While not identical like the first set of elements, these two pursue the same ends. The *Jefferson Parish* majority opinion described the essential characteristic of unlawful arrangements as any that uses market power over the tying product to force the purchase of a tied product.[164] This arrangement is particularly evident when the tied product is something that the buyer either "did not want at all, or might have pre-

155. *Id.* (citing Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 514 at n. 9 (1969)).
156. *See id.* at 32.
157. *See* Matthew Speiser, *This Video Shows how the World Economy has Evolved over the Last 35 Years*, BUSINESS INSIDER (Oct. 4, 2015), https://www.businessinsider.com/how-world-economy-evolved-over-35-years-2015-10.
158. *Compare* Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) *with* Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 32, 35 (1984) (O'Connor, J., concurring).
159. *See* United States v. Microsoft Corp., 253 F.3d 34, 85 (D.C. Cir. 2001) (summarizing the disparately enumerated elements of *Jefferson Parish)*.
160. *Jefferson Par*., 466 U.S. at 41 (1984) (O'Connor, J., concurring).
161. *Id.* at 18 (majority opinion); *Id.* at 37–38 (O'Connor, J., concurring).
162. *Id.* at 16 (majority opinion).
163. *Id.* at 39 (O'Connor, J., concurring).
164. *Id.* at 12 (majority opinion).

ferred to purchase elsewhere on different terms."[165] Justice O'Connor's concurrence expresses this same concern for the consumer's desire to purchase its items separately: "[f]or products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product*."[166] For both opinions, the concern is the same: when a tying arrangement forces the combined sale of separate items, it restrains consumer choice and competition.

The final element suggested by Justice O'Connor is the threat of market power in the market of the tied product.[167] However, two elements remain from the majority's partial *per se* rule: forced purchase of the tied item and foreclosure of a substantial volume of commerce.[168] These final two elements can be combined to amount to the same concern of a threatened monopoly in the second market.

As the majority describes, forcing a purchase is the essential characteristic of an unlawful tying arrangement.[169] "When such 'forcing' is present, competition on the merits in the market for the tied item is restrained."[170] The concurrence follows this line of concern when speaking of the threatened second monopoly: "[n]o such threat exists if the tied-product market is occupied by many stable sellers who are not likely to be driven out."[171] In other words, if there are no forced restraints on the market, there is no threat of market power in the tied-product market.[172]

When the majority speaks on the subject of market foreclosure, the similarities are even more marked.[173] "[W]e have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed," the majority asserts.[174] This "foreclosure' represents a concern that a portion of the market will be restrained by the power of the seller.[175] In a footnote, the majority opinion made this comparison more directly: "[t]he tying seller may be working toward a monopoly position in the tied product and, even if he is not, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market."[176] By comparing the opinions' own comments, we see that, though they use different language, they were discussing the same concerns. One triggers *per se* unlawfulness, while the other simply serves to assist a judge applying the rule of reason, but the considerations and interests served by each rule are essentially the same.

165. *Id.*
166. *Id.* at 39 (O'Connor, J., concurring) (emphasis in original).
167. *Id.* at 38–39.
168. *See* United States v. Microsoft Corp., 253 F.3d 34, 85 (D.C. Cir. 2001).
169. *Jefferson Par.*, 466 U.S. at 12 (majority opinion).
170. *Id.*
171. *Id.* at 38 (O'Connor, J., concurring).
172. *Id.*
173. *Id.* at 16 (majority opinion).
174. *Id.*
175. *Id.*
176. *Id.* at n.19 (citing Fortner Enters., Inc. v. United States Steel Corp, 394 U.S. 495, 513 (1969)).

B. The Purpose of Per se Analysis is Foiled by a Partial Rule

One of the reasons that *per se* analysis exists is so that firms are discouraged from engaging in certain practices.[177] Because of this harsh deterrent effect, courts only invoke the *per se* rule of analysis when a business behavior is clearly anti-competitive.[178] Courts have gone so far as to say that *per se* analysis applies to acts that have no other feasible purpose besides harming competition.[179] Because of this high standard, *per se* is typically reserved for acts that have such a high likelihood of anticompetitive effects that further examination (through the rule of reason) is unjustified.[180] Tying arrangements do not fit within this mold.[181] The *Jefferson Parish* majority was scrupulous in its attempt to clarify this point.[182] Tying arrangements were only "*per se*" unlawful when the listed elements were met.[183] Justice O'Connor, on the other hand, was more explicit in her recognition of this inconsistency with *per se* offenses.[184] "Tie-ins may entail economic benefits," she recognized, just before listing boons the practice may bestow.[185] Clearly, tying arrangements do not serve this first purpose of *per se* rules.

Per se analysis can also serve as an evidentiary shortcut through the "morass" that is the rule of reason.[186] Courts have suggested that the *per se* rule is not different from the rule of reason; it is merely a simplified analysis.[187] If the offense is unlawful often enough, a court will apply *per se* analysis to save time and avoid the expense of a more thorough examination.[188] That purpose is not served if a court must first meet a threshold of four elements every time it seeks to apply the *per se* rule. The length of the *Jefferson Parish* opinion clearly demonstrates the inefficiency of this "shortcut."[189] The majority is performing the very same analysis the *per se* rule seeks to avoid. It is a logical fallacy to require courts to apply a rule of strict liability that is not actually strict so as to avoid an analysis that it must actually still perform.

C. Possible Undesirable Outcomes of the Partial Per se Rule

The unintended consequences of this partial *per se* rule are both economic and legal in nature. Detrimental economic effects mainly concern the deterrent effect of the *per se* rule.[190] The Supreme Court expressed this concern over two decades ago for another offense: "*per se* . . . would discourage firms from chang-

177. *See* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 129 (1998).
178. Guerrero v. Bensalem Racing Ass'n, Inc., 25 F. Supp. 3d 573, 587 (E.D. Pa. 2014).
179. *Id.*
180. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 103–04 (1984).
181. *Jefferson Par.*, 466 U.S. at 11–12 (1984) ("It is clear, however, that every refusal to sell two products separately cannot be said to restrain competition.").
182. *Id.*
183. *Id.* at 15–16; *see also* United States v. Microsoft Corp., 253 F.3d 34, 85 (D.C. Cir. 2001).
184. *Jefferson Par.*, 466 U.S. at 41 (O'Connor, J., concurring).
185. *Id.*
186. United States v. Kemp & Assoc., Inc., 907 F.3d 1264, 1272 (10th Cir. 2018).
187. *Id.*
188. *Id.* at 1272–73.
189. *Id.; see Jefferson Par.*, 466 U.S. 2 (majority opinion).
190. NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 129 (1998).

ing suppliers—even where the competitive process itself does not suffer harm."[191] Fear that a *per se* rule may deter more anticompetitive practices than intended is ever-present.[192]

Tying arrangements, which are deterred by a *per se* rule, have many positive effects. Generally, bundling lets buyers get more product for less cost, which proves a great benefit to the consumer.[193] Some analysts have also contended that tying arrangements stimulate demand, reduce unsustainable pricing models, promote efficiency, and lower transaction costs.[194] "In short, there are many procompetitive, or at worst competitively neutral, reasons for bundling."[195] It is unwise to deter such a positive business practice with a *per se* invocation.

The rule should also be simplified to prevent confusion in the courts. Some federal districts already seem to think that tying arrangements are examined under the rule of reason.[196] Just last August, the Eastern District of Pennsylvania implemented the rule of reason, rather than the partial *per se* rule.[197] The complexity of the partial *per se* rule looks enough like the rule of reason that these courts are already slipping into the "wrong" rule (though the "wrong" rule is the better analysis).[198]

V. CONCLUSION

As discussed herein, the *Jefferson Parish* partial *per se* standard must be overturned. The partial *per se* rule in the majority and the rule of reason analysis suggested in the concurrence are identical in practice,[199] and the purposes of the *per se* rule are foiled by this hybrid agglomeration.[200] Further, there are legal and economic ramifications that confuse the law and deter pro-competitive behavior.[201] There is a common idiom: "if it looks like a duck, swims like a duck, and quacks like a duck, then it probably *is* a duck."[202] The *Jefferson Parish* majority opinion implements a partial *per se* rule that looks, acts, and reasons much like the rule of reason test. It is so much like the rule of reason and so poorly serves the purposes of *per se* rules, that it has no place in antitrust jurisprudence. To simplify and clarify, the partial *per se* rule of *Jefferson Parish* must be abolished, and tying arrangements should instead be analyzed under the rule of reason.

191. *Id.* at 136–37.
192. *Id.*
193. Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 895 (9th Cir. 2008).
194. Thomas A. Lambert, *Evaluating Bundled Discounts*, 89 MINN. L. REV. 1688, 1723–24 (2005).
195. *Id.* at 1724.
196. Pfizer Inc. v. Johnson & Johnson, 333 F. Supp. 3d 494, 503 (E.D. Pa. 2018) ("bundled rebate claims are analyzed under a rule of reason framework.").
197. *Id.*
198. *See id.*
199. *See supra*, Subpart IV.
200. *See supra*, Subpart IV(B).
201. *See supra*, Subpart IV(C).
202. *Duck Test*, WIKIPEDIA, https://en.wikipedia.org/wiki/Duck_test (the origin is debated, so to avoid presumption, a common, colloquial source is here cited).